ST 99-15
Tax Type: Sales Tax
Issue: Books and Records Insufficient
Interstate Sales (Non-Verified)

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

DEPARTMENT OF REVENUE **STATE OF ILLINOIS**	}	94 ST 0000 NTL# SF 190000000000000 0000-0000
v.		
"CREST, LTD." Taxpayer		Mimi Brin Administrative Law Judge

RECOMMENDATION FOR DISPOSITION

Appearances: Messrs. Edward C. Richard and Howard L. Stone and Ms. Lois R. Soloman of Stone, McGuire & Benjamin for "Crest, Ltd."; Mr. Alan Osheff, Special Assistant Attorney General for the Illinois Department of Revenue

Synopsis:

This matter comes on for hearing pursuant to "Crest, Ltd.'s" (hereinafter referred to as "Crest" or the "Taxpayer") protest of Notice of Tax Liability SF 190000000000000 (hereinafter referred to as the "NTL") issued by the Illinois Department of Revenue (hereinafter referred to as the "Department") for Retailers' Occupation Tax (35 **ILCS** 120/1 *et seq*.) (hereinafter referred to as "ROT" or the "ROTA") and related taxes for the period of July 1, 1990 through June 30, 1993 (hereinafter referred to as the "Tax Period").[1] The tax liability assessed by the Department is $141,393. Taxpayer concedes

[1] The tax period at issue extends from 1990 through June, 1993. As of January 1, 1993, the ROTA has been found at 35 **ILCS** 120/1 *et seq*. (P.A. 87-1005) Prior to that date, the Act was at Ill. Rev. Stat. ch.

a tax liability of $81,483, disputing the remaining assessment as representing retail sales exempt from ROT as interstate sales made in 1990 and 1991. "Crest" further protests the assessment of a 30% fraud penalty. Following the submission of all evidence and a review of the record, it is recommended that this matter be resolved, as amended by this order, in favor of the Department. In support of this recommendation I make the following findings of fact and conclusions of law:

Findings of Fact:

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, was established by the admission into evidence of the Correction and/or Determination of Tax Due, showing a total liability due and owing in the amount of $183,811 exclusive of any statutory interest. Department Ex. No. 1 (NTL); Department Ex. No. 2

2. The liability assessed by the Department is for the taxable period of July 1, 1990 through June 30, 1993. *Id.*

3. The Department auditor, Kevin Riordan (hereinafter referred to as "Riordan" or the "Auditor"), determined that taxpayer underreported its receipts for the tax period, to wit: 1) 7/1/90 -12/31/90 = $434,222; 2) 1/1/91-12/31-91 = $1,042,749; 3) 1/1/92-12/31/92 = $236,453; 4) 1/1/93-6/30/93 = $59,143. Tr. p. 23; Department Ex. No. 4

4. Taxpayer agreed to $1,094,524 of these unreported receipts (Tr. pp. 25-26, 28-29, 138-40; Taxpayer Ex. No. 1) thereby agreeing to $81,483 in tax due (Taxpayer Ex. No. 1) with the remainder of the tax represented on the

120, par. 440 *et seq.* I use the current citation form in this recommendation, unless the provision discussed

NTL attributable to alleged interstate sales of liquor in 1990 and 1991. Department Ex. No. 1, 2

5. The Department assessed a fraud penalty of 30% in this matter as a result of the amount of unreported receipts agreed to by the taxpayer, the questionable authenticity of an affidavit provided to the auditor regarding alleged interstate sales of liquor, and the general lack of sufficient documentation to substantiate these sales. Tr. pp. 26, 39, 51, 186-88

6. During the tax period, "Crest, Ltd." was an S corporation that "Gustavo" a/k/a "Peter Timkin" (hereinafter referred to as “Timkin”) opened on January 1, 1987. Tr. pp. 113, 114 This business is also known as "Buy It Now Liquors". Tr. p. 114

7. During the tax period, "Crest" was a retailer of liquor, tobacco and food, with one location in "Someplace", Illinois. Tr. pp. 114, 115; Department Ex. No. 1, 2

8. "Crest" sold liquor to "Etna" Packing (hereinafter referred to as “Etna”), a meat packing company located in (Someplace out of state). Tr. pp. 116, 151

9. "Etna" was owned by Mr. "Marco Polo" (hereinafter referred to as “Polo”), an old family friend. Tr. pp. 115-16, 164

10. "Timkin" lent "Polo", personally, about one million dollars over the course of years. Tr. p. 164

11. "Etna" paid for its purchases in cash, in advance of delivery. Tr. pp. 117-118, 148, 149

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differed substantively during the tax period.

12. 'Timkin" never gave "Etna" an invoice or other document that showed, on its face, that any purported purchase was paid. Tr. p. 149

13. In 1989, 1990, 1991 and 1992, "Crest" delivered liquor to "Etna" in (out of state) and (in state) *via* vans and trucks driven by various persons on behalf of "Crest". Tr. pp. 71-72, 75, 76, 86, 140-41,155, 181 "Crest" either supplied the vehicles, which were not its own, or the deliverers used their own vehicles. Some drivers were compensated for their deliveries, while others were not. Tr. pp. 74, 81, 83, 140-41; Taxpayer Ex. No. 5, 6 No common carriers were used. Tr. p. 140

14. "Crest" produced only one bill of lading representing its sales to "Etna". Tr. pp. 142-43, 156; Taxpayer Ex. No. 11 It supplied this to the particular deliverer because that person asked to be given one for that delivery. Tr. pp. 86-87

15. On June 22, 1992, "Crest" was burglarized, and some documents stored in the basement were destroyed. Tr. pp. 57-59, 99, 121

16. "Crest's" business records for 1992 were kept in a file cabinet that was not in the basement. Tr. pp. 123, 153-54

17. During the audit of this taxpayer, Riordan was provided only five invoices for the pertinent time period for taxpayer's sales to "Etna", and these invoices were provided to the Department by taxpayer's counsel who received them from "Etna". Tr. pp. 119, 131-32, 157-58, 189

18. At the time of the audit, the Department auditor had been so employed for about six or seven months. Tr. pp. 46-47

19. Prior to hearing, but subsequent to the issuance of the NTL, "Crest" produced more invoices, claimed to be from "Etna", representing purported sales of liquor from it to "Etna". Tr. pp. 192-93

20. "Crest", through 'Timkin", pled guilty, in March, 1998, to a violation of the Retailers' Occupation Tax Act, 35 **ILCS** 120/13, admitting that during the month of February, 1991 it willfully failed to report all receipts from its sales of tangible personal property at retail on its ROT return as statutorily required. Tr. pp. 144-45; Taxpayer Ex. No. 12 In so doing, it averred that it pled guilty because it was guilty. Taxpayer Ex. No. 12

21. During the tax period, "Crest's" average sale to a retail customer was $15-$20 dollars. Tr. pp. 147-48, 159

22. Purported sales to "Etna" were thousands of dollars each. Taxpayer Ex. No. 9 "Crest" did not sell in large quantities to any other customer. Tr. pp. 137, 161

23. "Crest" did not necessarily deposit the cash it received from sales to "Etna" into its business account. Tr. pp. 159-60

24. For the tax period, "Crest" claims $619,400 of interstate sales to "Etna". Tr. pp. 135, 137-38; Taxpayer Ex. No. 1, 2

25. "Crest" never reported these sales on Line 1 of its ROT returns, with a corresponding deduction of this amount as interstate sales. Tr. p. 189; Department Ex. No. 4 Rather, taxpayer simply eliminated these sales from any calculation of tax due. Tr. p. 189

26. For the tax period, "Crest's" books and records, in major part, consisted of its bank statements which did not reconcile with its federal income tax returns or with its filed, ROT returns, with the difference resulting in unreported, taxable receipts. Tr. pp. 189-90; Department Ex. No. 4

Conclusions of Law:

During the tax period, "Crest" was a retailer of tangible personal property in Illinois. As such, it was subject to the mandates of the Retailers' Occupation Tax Act, which imposes a tax upon persons engaged in the business of selling tangible personal property at retail. 35 **ILCS** 120/2 The Department audited this taxpayer for the period from 7/90-6/30/93, resulting in an agreed tax liability of $81,483 representing over one million dollars of unreported receipts. At issue are alleged retail sales of liquor made by "Crest" to an (out of state) business, with "Crest" delivering purchases to the buyer in (that state). The taxpayer never identified these sales as gross receipts on its monthly ROT returns, yet claims them as sales in interstate commerce, and, thus, exempt from the application of ROT.[2]

There is an exemption from tax in the ROTA for engaging in business in interstate commerce. It is found in §2-60 therein.[3] The Department has a regulation which also

[2] There is no evidence of record that "Crest" held a permit, issued by the U.S. Secretary of the Treasury, to engage in the business of selling or delivering for sale, alcohol, interstate in compliance with §203 of the Federal Alcohol Administration Act, 27 USCA §203. Tr. p. 148 ('Timkin"' testimony that he does not have a distributor's license)

[3] The Interstate commerce exemption reads:

> §2-60 Interstate commerce exemption. No tax is imposed under this Act upon the privilege of engaging in a business in interstate commerce or otherwise, when the business may not, under the Constitution and statutes of the United States, be made the subject of taxation by this State.

35 **ILCS** 120/2-60

addresses this exemption and it is found at 86 Ill. Admin. Code, ch. I, sec. 130.601 *et seq.*

That regulation states, in pertinent part:

> 130.605 Sales of Property Originating in Illinois
>
> a) Where tangible personal property is located in this State at the time of its sale … and then delivered in Illinois to the purchaser, the seller is taxable if the sale is at retail.
>
> XXX
>
> b) The tax does not extend to gross receipts from sales in which the seller is obligated, under the terms of his agreement with the purchaser, to make physical delivery of the goods from a point in this State to a point outside this State, not to be returned to a point within this State, provided that such delivery is actually made.

These statutory and regulatory provisions must be read in conjunction with §7 of the ROTA that provides, in pertinent part:

> §7. Every person engaged in the business of selling tangible personal property at retail in this State shall keep records and books of all sales of tangible personal property, together with invoices, bills of lading, sales records, copies of bills of sale, inventories prepared as of December 31 of each year or otherwise annually as has been the custom in the specific trade and other pertinent papers and documents.
>
> XXX
>
> To support deductions made on the tax return form, or authorized under this Act, on account of receipts from isolated or occasional sales of tangible personal property, on account of receipts from sales of tangible personal property for resale, on account of receipts from sales to governmental bodies or other exempted types of purchasers, on account of receipts from sales of tangible personal property in interstate commerce, and on account of receipts from any other kind of transaction that is not taxable under this Act, entries in any books, records or other pertinent papers or documents of the taxpayer in relation thereto shall be in detail sufficient to show the name and address of the taxpayer's customer in each such transaction, the character of every such transaction, the date of every such transaction, the amount of receipts realized from every such transaction and such other information as may be necessary to establish the non-taxable character of such transaction under this Act.

35 **ILCS** 120/7; See also, 86 Ill. Admin. Code, ch. I, sec. 130.605 (e)

During the audit, taxpayer provided the auditor with about five invoices representing sales of liquor it made to "Etna" for delivery out of state.[4] In addition, it provided an affidavit, dated December, 1993, from "Etna's" president, "Marco Polo", who stated that his business purchased $619,400 worth of liquor from "Crest" during 1990 and 1991, that were delivered to "Etna" (out of state). "Etna" also provided 5 invoices alleged to reflect those purchases.[5] The Department's auditor initially accepted the affidavit and invoices as sufficient evidence that sales in the amount averred to in the affidavit were made (Tr. pp. 29-30, 34; Taxpayer Ex. No. 1), and he corrected taxpayer's returns for the tax period to reflect only the approximate one million dollars of otherwise unreported sales equaling $81,483 in tax liability. *Id*. The auditor did not add a fraud penalty to this original determination. *Id*.

After taxpayer agreed to this correction, for which no NTL was generated, a subsequent audit supervisor, Steven Kreiter (hereinafter referred to as "Kreiter") determined that the affidavit and dearth of invoices provided were insufficient to sustain the claimed interstate sales. Kreiter also determined that a fraud penalty was appropriate based upon, *inter alia*, the large amount of agreed to unreported receipts, as the NTL results from both $81,483 in tax liability not contested herein, as well as the disallowed, claimed interstate sales.

[4] These invoices are found in Taxpayer Ex. No. 2. They are duplicated in Taxpayer Ex. No. 9. Therefore, any discussion of these specific invoices will be referenced as they appear in Ex. No. 9.

[5] The Department objected to the admission into evidence of this affidavit. Tr. p. 175 It was admitted, but for a limited purpose-that being that it was a document seen by the auditor when he conducted his audit. Tr. p. 176 It was specifically not admitted for the consideration of any substantive matter found therein. *Id*.

The ROTA provides that the Correction and/or Determination of Tax Due as well as the NTL issued by the Department in this cause are *prima facie* proof of the correctness of the amount of tax due as shown on those documents. 35 **ILCS** 120/4 It is well-settled Illinois law that "[i]n order to overcome the presumption of validity attached to the Department's corrected returns" the taxpayer "must produce competent evidence, identified with their books and records and showing that the Department's returns are incorrect. Copilevitz v. Department of Revenue, 41 Ill.2d 154 (1968); Masini v. Department of Revenue, 60 Ill. App.3d 11 (1st Dist. 1978). Oral testimony is not sufficient to overcome the *prima facie* correctness of the Department's determinations. Mel-Park Drugs, Inc. v. Department of Revenue, 218 Ill. App.3d 203 (1st Dist. 1991); A.R. Barnes & Co. v. Department of Revenue, 173 Ill. App.3d 826 (1st Dist. 1988) When the taxpayer's "evidence is not so inconsistent or improbable in itself as to be unworthy of belief, the burden then shifts to the Department, which is required to prove its case by competent evidence." Fillichio v. Department of Revenue, 15 Ill.2d 327 (1958); Mel-Park Drugs v. Department of Revenue, *supra*

In this matter, testimony was given that in June, 1992, the business was burglarized. As a result of that burglary, business documents for years prior to 1992, which were stored in boxes in the basement, were doused with a liquid which required that they be discarded. Although taxpayer did not introduce any police or other official report of this event, I find that the oral testimony provided by several witnesses is credible as to the fact that a burglary occurred.

I do not, however, find any credible evidence presented to support over $600,000 worth of interstate sales as claimed. As a result of the burglary, "Crest" avers that its

invoices for 1990 and 1991 were destroyed, and, the only evidence it can offer are invoices from its customer, "Etna" (Taxpayer Ex. No. 9), and a bill of lading it gave to one of the private drivers it used to make a delivery. Taxpayer Ex. No. 11 At best, "Crest" only presented documentation representing $249,414 worth of sales.[6]

Even though "Crest" presented these invoices, I cannot give it credit for all of them, because they are, on their face, fatally defective. §7 of the ROTA, as cited, *supra*, mandates, *inter alia*, that the documentation kept by a retailer in support of its claimed exempt sales "shall be in detail sufficient to show the name and address of the taxpayer's customer in each such transaction, the character of every such transaction, the date of every such transaction… ." Although the invoices show sales to "Etna" and generally show the character and amount of the sale, important and necessary information is not provided on every one of them.

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[6] The writing on these invoices is extremely difficult to read with numbers being almost indiscernible. Taxpayer Ex. No. 9 is a group exhibit, but the individual pages were not numbered. I have numbered each page, with my numbers appearing, circled, in the bottom right corner. The amounts on the invoices were credited as follows:

(1)	$11,075
(2)	5,250
(3)	8,500
(4)	8,425
(5)	7,875
(6)	16,984
(7)	16,900
(8)	26,000
(9)	19,600
(10)	25,000
(11)	21,030
(12)	8,650
(13)	8,500
(14)	24,000
(15)	15,750
(16)	3,500
(17)	4,625
(18)	8,250
(19)	9,500

I determine that the bill of lading and invoice #2 reflect the same transaction. Therefore, the $5250 shown in each is credited once. My discussion of this duplication is found in the main text of this recommendation, *infra*.

Mr. "Vlatos Pushkin" (hereinafter referred to as “Pushkin”) testified that he transported liquor cases on "Crest’s" behalf into (another state) for delivery to "Etna’s" agents during 1989, 1990, 1991 and 1992 Tr. p. 76 "Pushkin" also testified that he made three deliveries to "Etna" agents, on behalf of "Crest", in "Small Town", Illinois.[7] Tr. p. 86 Based upon this testimony, it is reasonable to conclude that other deliveries to "Etna" were also made intrastate, as "Crest" used a number of different private drivers. The sales delivered into Illinois do not qualify as sales in interstate commerce. 86 Ill. Admin. Code, ch. I, sec. 130.605(a) Invoices #4, 7, 8, 11, 12, and 15 do not have "Etna’s" address or otherwise indicate delivery into (another state). Therefore, this evidence is not sufficient, on its face, to support a claim of exemption from the application of the ROTA, and, thus, does not rebut the statutory presumption of taxable sales.

Further, although "Pushkin" testified that he made delivery trips into (another state) in 1989, 1990, 1991 and 1992, the tax period at issue is from 7/1/90 through 6/30/93. Therefore, "Crest" was selling and delivering liquor to "Etna" prior to the tax period. The following invoices are undated: #3, 5, 6, 7, 8, 9, 10 (the number designating the year on this invoice appears to be an “8”), 15, 16, 17, 18, 19. Tr. p. 163 ('Timkin" concedes that he did not always date the invoices) Further, invoice #2 shows a date of “4/20/9”. Credit cannot be given to this sale if it occurred on April 20, 1990, because that was prior to the tax period. Thus, this invoice is deficient to the extent that it cannot be used in support of taxpayer’s position. However, this invoice appears to reflect the same

[7] "Pushkin's" testimony at hearing regarding the number of trips and the years of the trips he made into (another state) for "Crest" (Tr. pp. 75, 76), conflicts with the Department investigator’s testimony at hearing concerning the same points. Tr. p. 181 After observing both witnesses as they testified, and after a careful examination of the hearing transcript, I find the Department investigator a more credible witness.

transaction as is presented by the bill of lading (Taxpayer Ex. No. 11), as the bill of lading references #0354, which appears as the invoice number. Additionally, both the bill of lading and invoice #2 reflect the same number of cases of liquor and amount of sale. I conclude, therefore, that invoice #2 and the bill of lading reflect the same sale and should be counted only once. Since the bill of lading shows a date of 4/20/91, it is within the tax period. As a result of the above, invoices # 2, 3, 5, 6, 7, 8, 9, 10, 15, 16, 17, 18, 19 do not rebut the statutory presumption of taxable sales during the tax period.

The affidavit provided to the auditor by "Polo" is offered as other evidence that over $600,000 of interstate sales were made to "Etna" in 1990 and 1991. Taxpayer Ex. No. 2 "Polo" was subpoenaed by the taxpayer to appear at this hearing.[8] Taxpayer Ex. No. 7 In response, he provided an affidavit stating that he was not available on the hearing date, but, would be available after April 3, 1999. In lieu of his appearance at hearing, taxpayer asked to admit his evidence deposition, taken on December 21, 1998. It was admitted. Taxpayer Ex. No. 13

At this deposition, "Polo" asserted his fifth amendment right to remain silent (U.S. Const. amend. V) to every substantive question relating to his and/or "Etna's" interaction with "Crest" and 'Timkin", to wit: "[d]uring the years 1990, '91 and '92, did you have occasion to do business with a company known as "Crest" Liquors?"; "[d]uring the years 1989, 1990, 1991 and 1992, did you or an entity that you—or an entity that you own or represent purchase any liquor from "Crest" Liquors?"; "[d]uring the years 1989, '90, '91 and '92, did you or an entity in which you have an ownership interest or

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Therefore, I believe that "Pushkin" delivered liquor into (another state) from 1989 into 1992, and, that those deliveries were closer in number to three than they were to ten to fifteen per year.

[8] The subpoena was served on March 24, 1999 for a March 30 hearing. The hearing date was set, by order, on December 7, 1998.

represent purchase any liquor from Mr. "Gustavo Timkin" or any entity that he owned?"; "[d]o you know Mr. "Gustavo Timkin"?"; "[d]id you ever purchase any items from mister—any item at all—from Mr. "Gustavo Timkin" or any entity that he owned or represented?" *Id*. at pp.5-8 In fact, in response to questioning by Department's counsel at the deposition, "Polo" stated: "[w]ell, I'm going to assert my Fifth Amendment all the way around per my attorney,[9] constitutional right, so any question you're going to ask me, Counsel, I'm going to assert it so…We're going to—just going to play a game here? Well, let's go and play it then." *Id*. at 7

Even if "Polo'" original affidavit, which was given to the auditor during the audit, was admitted as evidence of the facts stated therein, I would not give it any credibility in light of his refusal to answer questions relating to the facts stated therein at a time when he could be cross-examined on those particulars, that is, during his evidence deposition taken at a later date. "Crest" advised at hearing that it intended to call "Polo" as its own witness. Tr. pp. 106-07 It then requested that his evidence deposition be admitted. It is, therefore, bound by "Polo'" failure to respond to its direct questioning.

As a result of the above, most of "Crest's" claim of over $600,000 in interstate sales to "Etna" during 1990 and 1991 remains unsupported by consistent, credible evidence, and the Department's *prima facie* correct assessment of ROT, as evidenced by the Correction and/or Determination of Tax Due and the NTL, remains unrebutted for the most part. At best, only invoices #1 ($11,075), 13 ($8,500) and 14 ($24,000) and the bill of lading ($5250) can be credited as interstate sales during the tax period, and, I recommend that the NTL be amended to reflect this.

[9] "Polo" did not appear at the deposition with counsel. Although he repeatedly stated that his attorney advised him to invoke the fifth amendment in response to questions, he refused (Taxpayer Ex. No. 13, p. 7)

The final issue is whether the fraud penalty is appropriate in this case. Taxpayer does not quarrel with the Department's assessment of $81,483 of tax liability representing over one million dollars of unreported sales during the tax period. Nor does it contest that the taxpayer pled guilty to a Class A misdemeanor, therein admitting that it willfully failed to report all of its receipts from the sale of tangible personal property to the State on its ROT return for February, 1991.

Rather, its protest rests on the fact that the auditor did not assess a fraud penalty after initially completing the audit in December, 1993, even though the sole basis of the auditor's determination of tax liability at that time was over one million dollars of unreported receipts.

Based upon the record, the fraud penalty was correctly assessed. The statutory provision governing the 30% fraud penalty for the tax period was §4 of the ROTA.[10] In order to sustain the fraud penalty, the Department must prove fraud with clear and convincing evidence. Puleo v. Department of Revenue, 117 Ill. App.3d 260 (4th Dist. 1983); Brown Specialty Co. v. Allphin, 75 Ill. App.3d 845 (3rd Dist. 1979) "Proof of fraud requires proof of the element of intent", and "intent may be shown by circumstantial evidence." Vitale v. Illinois Department of Revenue, 118 Ill. App.3d 210, 213 (3rd Dist. 1983)

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to identify the attorney.

[10] As of January 1, 1994, the penalty provisions for the fraudulent filing of ROT returns is found in the Uniform Penalty and Interest Act, 35 **ILCS** 735/3-1 *et seq*., and specifically in sections 3-4 and 3-6 therein. Statutory provisions as found in the ROTA in 1990-1993 provide the pertinent authority in this matter. Sweis v. Sweet, 269 Ill. App.3d 1 (1st Dist. 1995)

The auditor's calculations, taken from the taxpayer's own records and its ROT filings, demonstrate that the taxpayer underreported its sales to the Department by the following percentages:

7/90-12/90	70.95%	(43422/612,001)
1/91-12/91	81.18%	(1042749/1284533)
1/92-12/92	18.18%	(236453/1300902)
1/93-6/93	13.17%	(59143/449153)

Department Ex. No. 4 These percentages of unreported receipts represent monies "Crest" admits not reporting as well as monies on sales it cannot support with credible, competent documents or supporting testimony. In fact, the taxpayer acknowledged that it willfully underreported receipts for one month in this tax period during the criminal prosecution brought by the Department. "Crest" began doing business in January, 1987. Even giving 'Timkin" time to establish his business procedures and become acquainted with the specifics of the liquor retail business, it is undisputed that 2½ years after business began, "Crest" was not reporting all of its receipts for tax purposes, and this underreporting continued for at least 2½ years thereafter. 'Timkin" is not an uneducated man,[11] and although his expertise may not have been in this specific business, he did have experience in retail sales. Tr. p. 169 (testimony of reputation witness that 'Timkin" was a salesman of suits at Bigsby & Kruthers) Taxpayer's admitted actions in not reporting such large amounts of sales speak to business activity so extreme that it cannot be attributed, simply, to lack of business expertise.

This intentional underreporting of receipts is further supported by facts surrounding the contested assessment for $619,400 worth of sales alleged to have been

[11] He testified that he has a master's degree in literature and history from Northeastern Illinois University. Tr. p. 113

made in interstate commerce in 1990 and 1991. 'Timkin" testified that "Etna" made cash payments for all of its liquor purchases, and he did not always deposit all of the monies so received into "Crest's" business accounts. (See Department Ex. No. 4-books and records taken from deposit section taxpayer's bank statements are not consistent with taxpayer's federal income tax returns) Nor were these sales even reported on "Crest's" ROT returns, in direct contravention to the ROTA that mandates, *inter alia*, reporting, on the ROT returns, total receipts from all sales, followed by a reporting of receipts received from ROT exempt transactions. 35 **ILCS** 120/3

These facts are not dissimilar to those in Puelo v. Department of Revenue, *supra*, wherein the appellate court upheld the Department's fraud penalty assessment. In that case, taxpayer, although unaccustomed to American business procedures, consistently underreported receipts throughout the tax period, and maintained no books and records to support its ROT filings. That taxpayer also pled guilty to filing fraudulent ROT returns for some months within the tax assessment period. *Id*. at 265

After considering all of these facts, I conclude that the fraud penalty was correctly assessed. I make this determination even though the Department had not originally assessed it when it first advised the taxpayer of its tax liability following audit. First, the Department did not issue a NTL as a result of its initial determination. Rather, the auditor testified that he sent the audit report (Taxpayer Ex. No. 7) following taxpayer's counsel's request for the results. Tr. pp. 37-38 'Timkin" sent the Department a check for $20,000 (Tr. pp. 28, 139) in response to this audit report, but there is no evidence that either party actually signed it as provided for on the document, itself.

Even if the parties signed the report and intended it to be a final determination of liability, the Department later concluded that the report was incorrect, in that it did not include all of taxpayer's tax liability for the tax period and did not reflect a fraud penalty. Pursuant to that determination, the Department issued the NTL that reflects the fraud penalty, the agreed tax liability as well as contested tax liability.

This scenario is best exemplified by the Illinois Supreme Court in Austin Liquor Mart, Inc. v. Department of Revenue, 51 Ill.2d 1 (1972). In that case, the Department audited the taxpayer for the period of 8/1/66 to 7/31/69, and issued a NTL reflecting a tax liability. That taxpayer paid the liability without protest. Thus the NTL became final, as a matter of law. Months later, the Department subpoenaed taxpayer's books and records for the period 1/1/67 to 11/24/69. That taxpayer filed a motion to quash the subpoena as well as a petition seeking a mandatory injunction preventing the Department from further investigation of taxpayer's books and records for the period of time covered by the agreed to NTL. The issue presented to the court was "whether defendant [Department] may be estopped from reexamining plaintiff's books and records for the period in question because of its previous assessment and acceptance of payment for that period." *Id*. at 4

The Austin taxpayer argued that the finalized, agreed to NTL was binding on both parties and precluded further investigation by the Department for the period covered therein. The court disagreed, reiterating several basic legal premises, to wit: "[I]t is firmly established that where the public revenues are involved, public policy ordinarily forbids the application of estoppel to the State" (citations omitted) (*id*. at 5); "[I]t seems to be universally recognized that, generally, a State cannot be estopped by the acts and

conduct of its officers or agents in the performance of the governmental function of collecting taxes legally due" (citations omitted); (*id*.) and "[T]he government is not estopped by previous acts or conduct of its agents with reference to the determination of tax liabilities or by failure to collect the tax, nor will the mistakes or misinformation of its officers estop it from collecting the tax" (citations omitted) (*id*.), "unless necessary to prevent fraud and injustice." *Id*. at 6

The court in Austin further found that the trial court, which decided that the Department was estopped from further investigation of that taxpayer's books and records for the period in question based upon its issuance of the NTL and acceptance of payment thereon, mistakenly believed that the Department had the burden to establish taxpayer fraud as a condition precedent to its examination of books and records for a previously audited period. *Id*. at 8 The court concluded that no such burden existed in light of the strong, compelling public policy in favor of the proper collection of taxes.

In this case, the Department did not issue a NTL that became final as a matter of law, therefore, "Crest's" argument lacks the statutory base offered by the Austin taxpayer. Nor is there evidence that this taxpayer paid the entire liability as originally proposed. Further, I concur with Kreiter that the documents originally offered by "Crest" in support of its claimed interstate sales ("Polo'" affidavit and five invoices) were legally insufficient to support the amount of sales originally credited. And, as set forth, *supra*, I agree that the fraud penalty is properly assessed.

As a result of the above, I find that the Department is not estopped from issuing the NTL at issue, therein assessing additionally tax liability as well as a fraud penalty.

WHEREFORE, for the reasons stated above, I recommend that the NTL at issue be revised to eliminate tax liability for documents specifically identified herein, and, as so revised, that the NTL be finalized to include the fraud penalty, with interest to accrue pursuant to statute.

Date: 6/11/99

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Mimi Brin
Administrative Law Judge